IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 194 of 1995

For Approval and Signature :

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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KALSING BABUBHAI KOLI & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR JM BUDDHBHATTI, LEARNED ADVOCATE WITH MS NAYANA V PANCHAL for Appellants.
MR PD BHATE, LD.APP for Respondent-State.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 07/09/2007

ORAL JUDGMENT

1. The appellants-orig. accused nos.1 and 5 (hereinafter referred to as 'the appellants') have preferred the present appeal under Section 374 of the Code of Criminal Procedure, 1973, challenging the judgment and order of

conviction and sentence dated 24th January 1995, passed by the learned Additional Sessions Judge, Panchmahals at Godhra, in Sessions Case No.192 of 1993, whereby the learned trial Judge has held the appellants guilty for the charge of offences punishable under Sections 363 and 366 read with Section 114 of the Indian Penal Code and sentenced them to undergo simple imprisonment for three years and a fine of Rs.250/-, in default to undergo simple imprisonment for one month for each of the offences punishable under Sections 363 and 366 read with Section 114 of the Indian Penal Code. The learned trial Judge has ordered the sentences to run concurrently.

2. Shri J.M. Buddhbhatti, learned counsel appearing with Ms.Nayana Panchal for the appellants, has taken me through the basic case of the prosecution, charge framed and the and the evidence led during the course of trial. According to the case of prosecution, the minor victim girl Ramila (hereinafter referred to as 'the victim girl') was residing

at Dhanpur under the guardianship of her uncle Jvala Masur. The said uncle Jvala Masur was also the guardian of minor brother of the victim namely Bhupat. It is alleged that the victim girl was kidnapped by the orig.accused persons and she was forcibly asked to marry appellant no.1, who is the brother of brother-in-law (sister's husband) of the victim girl. Ultimately, the marriage of the victim girl was performed with the appellant no.1 and the same was registered with the Registrar of Marriages. The allegation is that the age of the minor is shown before the Registrar to be of 20 years, but the birth date of the victim is 26th June 1977. So on the date of offence, she was less than 18 years of age. So it is alleged that the act of taking away the minor victim from the guardianship of her uncle was an offending act under Section 363 of the Indian Penal Code. The intention of the accused persons was to see that the minor victim girl marries the appellant no.1 herein and she could be exploited sexually against

her wish and will.

3. On careful reading of paragraph no.16 of the judgment and order of conviction and sentence under challenge, it is clear that the evaluation of the evidence of the victim girl and the prosecution witnesses is contrary to law. The discussion as to the evidence and the details of marriage registration certificate and the procedure which was followed by the said uncle i.e. complainant, in getting the Search Warrant issued would not add any strength to the case of the prosecution. The kidnapping is an offence against the lawful guardianship and the offence punishable under Section 366 is an offence against the individual person. The learned trial Judge ought not to have given any weightage to the defence adopted by the accused persons because the prosecution was under obligation to establish its case beyond reasonable doubt. The appellant no.2 was not a stranger to the victim girl. Undisuptedly, appellant no.2 is

the real brother-in-law of the victim girl. Lila-real sister of the victim girl was of the view that her sister i.e. victim girl, should marry with her younger brother-in-law i.e. appellant no.1. It is in evidence that because of the social ties and as the victim girl and appellant no.1 were working together, the victim girl had some inclination to marry the appellant no.1. This fact has been brought by the defence-side by proving the contradictions. It appears that the version of the victim before the Court was an improved version and contrary to the story unfolded by her before the Police at an initial stage. In such a situation, there was no scope to believe the victim girl on merit. In the same manner, the deposition of the uncle of the victim girl also would not help the complainant. Ultimately, when the uncle was not the lawful guardian of the victim girl since Lila-real sister of the victim girl, undisputedly who was not a minor, was there to look after the interest of her minor brother

and sister; whether the complainant can claim that he was a lawful guardian, was also a question before the learned trial Judge. The learned trial Judge, according to Shri Buddhabhatti, learned counsel appearing for the appellants, has ignored many sensitive and relevant aspects while linking the accused with the crime. For short, according to Shri Buddhbhatti, the conviction recorded by the learned trial Judge is absolutely contrary to law and facts which were placed before the learned trial Judge.

4. Shri P.D. Bhate, learned Additional Public Prosecutor, in response to the query raised by the Court, has accepted that the ratio of the decision in the case of ***S. Varadarajan v. State of Madras, reported in AIR 1965 SC 942,*** would help the appellants herein considering the facts of the present case. Shri P.D. Bhate, learned Additional Public Prosecutor, has taken me through the discussion made by the learned trial Judge in paragraph nos.16,

17 and 18 of the judgment and order under challenge in the appeal, and it appears that once the victim girl was interested in getting married with the appellant no.1 herein. When it is the case of the prosecution that the victim girl had participated in the fair organised on one festival, from that place the appellant no.5 had taken her in an autorickshaw. There cannot be any case of kidnapping from the place from where she was allegedly kidnapped. She had ample opportunity for her to shout. Somebody must have accompanied her. She must not have visited the fair alone. At least some friends must have accompanied her. So her leaving the place of fair with the appellant no.5 being the brother-in-law (sister's husband) appears to be a voluntary act. It is in evidence that Lila-real sister of the victim girl was also present there in the said fair. So it is possible to infer that the victim girl had decided to join Lila and appellant no.5. The accused persons are not facing the charge of

declaring incorrect age of the victim girl before the Registrar of Marriages and a copy of the application preferred before the learned Judicial Magistrate First Class in getting the Search Warrant issued perhaps was not before the Court for consideration. It appears that the complainant must have suppressed one crucial fact that minor victim girl was at the house of her real elder sister Lila, otherwise the Court would not have issued the Search Warrant directly. This Court at present is not evaluating the propriety and legality of the Search Warrant issued, but it is relevant to observe that issuance of warrant by itself would not make the case of the prosecution strong.

5. The following main facts have taken me to a conclusion that the finding of guilt recorded by the learned trial Judge is erroneous and contrary to law :

(i) There is no convincing evidence to show

that the victim girl was kidnapped by any of the appellants against her wish and will.

(ii) It is not the case that the appellant no.1 was a party in taking away or inducing the victim girl.

(iii) The victim girl had left the place of fair with Lila-her real sister and brother-in-law (sister's husband) i.e. appellant no.5.

(iv) Jvala Masur-uncle of the victim girl was not a the lawful guardian. The learned trial Judge has erred in linking the accused persons with the criminal wrong which is made punishable under Section 363 of the Code of Criminal Procedure, 1973. Some social indecency on the part of Lila or appellant no.2-her husband would not make them criminally liable.

(v) When Lila is not prosecuted, the charge against her husband would not stand

because the prosecution at least ought to have cited her as a witness and she ought to have deposed that bringing of the victim girl from the place of fair by the appellant no.5 was also against the wish and will of Lila. But the evidence runs contrary and it has emerged that Lila was a party in taking the victim girl with her.

(vi) It is wrong to observe that the victim girl cannot marry when she is minor. On the contrary, with the consent of her guardians, the marriage of a minor girl at the most can be said to be voidable and such marriage would make the guardian responsible for committing offence punishable under the provisions of Child Marriage Restraints Act. For short, the learned trial Judge has stretched his imagination beyond law.

(vii) The family of the convict and the victim girl belongs to Scheduled Tribes. So the

customs of the tribal community ought not to have been ignored by the learned trial Judge. A real sister (Lila) who has married and settled in life if is ready to see that her real sister (victim girl) also settles in her life, then such a conduct of Lila or the appellant no.5 cannot be equated with the criminal wrong punishable under Section 366 of the Code of Criminal Procedure, 1973.

6. Here is it not necessary to reproduce the relevant part of paragraph nos.7 and 9 of the decision in the case of S. Varadarajan (supra), which has been read over before this Court by Shri Buddhbhatti, learned counsel appearing for the appellants. In the cited decision, the Apex Court has discussed the term “taking” and allowing a minor to accompany a person. In the present case, undisputedly the victim girl had accompanied Lila and appellant no.5; and thereafter, she

had agreed to marry the appellant no.1-real brother of appellant no.5, and therefore, the marriage was performed. On the date of deposition, the appellant no.1 was the husband of the victim girl. Even after attaining majority, she has not claimed that her marriage with the appellant no.1 may be declared dissolved as the same was against her wish and consent. For short, this is a case where the appellant nos.1 and 5 even would not have been charged for the offence punishable under Section 363 or 366 of the Indian Penal Code. At present, the present prosecution is nothing but ego clash of two families i.e. family of the complainant who was bringing uop the children namely the victim girl and her brother Bhupat, and the family of in-laws of Lila-real sister of the victim girl. The parents of the victim girl were no more on the date of offence. The bringing up of the victim girl by a close relative at the most can be said to be a person enjoying legal custody of the minor. The person having legal custody of

a minor can claim guardianship but against the third world and not against the real elders of the family i.e. real brother and sister, who had attained majority. This clear aspect perhaps has slipped out of the mind of the learned trial Judge and that has brought the judgment and order of conviction and sentence.

7. The learned trial Judge ought to have appreciated the distinction between the civil wrong or social indecency and punishable criminal wrong. It is difficult for this Court to believe that the act of either Lila-real sister of the victim or appellant no.2-brother-in-law of the victim girl was a criminal wrong in taking away the victim girl with them and proposing her to marry the appellant no.1. So without entering into further discussion and discussion of other evidence led by the prosecution, the Court is inclined to allow the present appeal.

8. In view of aforesaid observations and discussion, the present appeal is hereby

allowed. The judgment and order of conviction and sentence dated 24th January 1995 passed by the learned Additional Sessions Judge, Panchmahal at Godhra, in Sessions Case No.192 of 1997, is hereby quashed and set aside. The appellants are hereby ordered to be acquitted from all the charges levelled against him in respect of the offence in question. The amount of fine, if any paid by the appellants, be refunded to the appellants on their proper identification. The bail bonds executed by the appellants shall stand discharged.

(C.K. Buch, J)

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